

**FINAL SAFE HARBOR AGREEMENT
FOR THE
KARNER BLUE BUTTERFLY**

**THE NATURE CONSERVANCY – EASTERN NEW YORK CHAPTER
APRIL 2010**

1. INTRODUCTION

This Safe Harbor Agreement (Agreement) is entered into between The Nature Conservancy ("TNC"), the U.S. Department of the Interior, Fish and Wildlife Service ("Service"), and the New York State Department of Environmental Conservation ("State"), hereinafter collectively called the "Parties." The purpose of this Agreement is to promote the conservation of the Karner blue butterfly (*Lycaeides melissa samuelis*), Persius duskywing (*Erynnis persius*), and the frosted elfin butterfly (*Callophrys irus*) through the restoration, creation, enhancement, and management of their habitat on non-Federal land in eastern New York. This Agreement follows the Service's Safe Harbor Agreement policies (64 Fed. Reg. 32717) and regulations (50 C.F.R. §17.22(c)), both of which implement section 10(a)(1)(A) of the Endangered Species Act (ESA), and the State's endangered species law, NYS-ECL §11-0535, and regulations, 6 NYCRR Part 182.

2. LIST OF COVERED SPECIES

- A. For the purposes of New York law, the terms "covered species" or "butterflies" under this Agreement covers the following species – the Karner blue butterfly, a New York State endangered species, the Persius duskywing, a New York State endangered species, and the frosted elfin butterfly, a New York State threatened species.
- B. For the purposes of Federal law, the terms "covered species" or "butterflies" under this Agreement only apply to the Karner blue butterfly, listed as "endangered" under the ESA. The frosted elfin and Persius duskywing are not currently protected under the ESA, but the Service acknowledges that this Agreement may provide incidental conservation benefit to these species because they are found within the same habitat as the Karner blue butterfly. Should the frosted elfin or Persius duskywing become listed under the ESA in the future, TNC may request an amendment to this Agreement and its Federal permit to cover these species, including the baseline conditions originally established under any Cooperative Agreements pursuant to Parts 3 & 4, herein.
- C. The terms "covered species" and "butterflies" under Subsections 2.A and 2.B include all life forms including eggs, larvae, pupae, and adults.

3. DESCRIPTION OF ENROLLED LANDS

This program is focused in the primary recovery action area within New York State as discussed in the Karner Blue Butterfly Recovery Plan (Service 2003), the Glacial Lake Albany Recovery Unit, which includes portions of Albany, Schenectady, Saratoga, and Warren Counties. The properties subject to this Agreement consist of those non-Federal lands located within this Recovery Unit whose owners execute a written, binding contract with TNC in the form of a Cooperative Agreement, an example of which is attached hereto as Appendix A. Such willing non-Federal landowners are referred to herein as "Cooperator(s)". Such properties are referred to herein as the "Enrolled Property(ies)." The Enrolled Properties are to be more precisely identified through maps included with such Cooperative Agreements and will be further identified through photographs and legal descriptions included with such Cooperative Agreements. Current and recent land use practices on the Enrolled Properties are likely to be varied and may include agricultural and silvicultural uses as well as residential, commercial, and

industrial development. Habitat conditions and present uses on the Enrolled Property are also likely to be varied and will be described in the baseline documentation attached to the Cooperative Agreements. Such Cooperative Agreements shall be effective upon the signing thereof by the Cooperator and TNC and issuance of a written concurrence letter by the State.

4. BASELINE DETERMINATION

For each Enrolled Property, the Cooperative Agreement will specify the baseline conditions applicable to that property. Baseline conditions shall be determined in the following manner. A survey of the proposed Enrolled Property shall be completed by TNC in accordance with procedures specified in Appendix B, not more than one year prior to the signing of the Cooperative Agreement. If the survey finds no occupied habitat on the property, there shall be no baseline responsibilities applicable to the property. If the survey finds occupied habitat on the property, the baseline responsibilities with respect to the occupied habitat found shall be to avoid any action that reduces the amount (quantity and/or quality) of occupied habitat below that which was present at the time of the survey. Upon agreement between the TNC and Cooperator, the physical location of the occupied habitat may shift over time. Results of baseline surveys shall be appended to all Cooperative Agreements.

5. MANAGEMENT ACTIVITIES

Each Cooperative Agreement shall specify the management activities to be carried out by the Cooperator and/or by TNC on the Enrolled Property to which it applies. Such management activities shall be consistent with recommendations of the Karner Blue Butterfly Recovery Plan in effect at the time the Cooperative Agreement is entered (currently Appendix G of the Service's 2003 Plan) (see Appendix C) and may include other activities as may be agreed upon by the Cooperator, TNC, the Service, and the State. Management activities to create, restore, or maintain habitat for the covered species may include control of woody, shrubby, or invasive plants through mowing, manual or mechanical cutting, application of herbicides, or other means; planting native vegetation as nectar or larval food sources; use of prescribed burning to establish and maintain desired habitat conditions; and other appropriate measures.

The conservation benefits anticipated to be secured through this agreement include maintenance of existing habitat that may be threatened by natural succession, invasive species, or other loss/fragmentation, the creation of suitable habitat where it does not currently exist and, if approved by the Service and the State, the accelerated colonization (*e.g.*, translocation of Karner blue butterflies from another site) of existing or newly created suitable habitat. The individual Cooperative Agreements to be developed pursuant to this Agreement are intended to result in the creation of additional suitable habitat, buffering of existing core populations, facilitating dispersal between core areas, ensuring against the loss of existing populations as a result of catastrophic events, facilitating the recolonization of sites from which butterflies are lost, and accelerating the colonization of suitable sites. Although the individual Cooperative Agreements are finite in duration, they should ensure to the extent possible that the butterflies are better off during the life of the agreements, and no worse off at the end of the agreements, than they would have been without such agreements. Thus, the Service and State anticipate that implementation

of these management activities is reasonably expected to provide a net conservation benefit for the Karner blue butterfly, frosted elfin, and Persius duskywing.

6. OTHER RESPONSIBILITIES OF THE PARTIES

A. In addition to entering into Cooperative Agreements as described above, TNC agrees to:

1. Inform the Service and the State by e-mail or ground mail at the time of notification by the Cooperator or as soon thereafter as practicable, but no later than 10 business days, of the Cooperator's intent to make a change in land use likely to eliminate or reduce the amount of occupied habitat on the Enrolled Property, and cooperate with such agencies in the event that they choose to capture and/or relocate potentially affected individuals in response to such notification.
2. Monitor implementation of management activities specified in Cooperative Agreements and carry out annual surveys according to procedures specified in Appendix B on all Enrolled Properties to assess significant changes of abundance of the covered species thereon.
3. Maintain and provide electronic records and documentation of all Enrolled Properties for the duration of the permit. These shall include:
 - a. Cooperator contact information and
 - b. Digital maps of baseline conditions (GIS).
4. Report to the Service and the State by telephone or e-mail at the time of the discovery or as soon thereafter as practicable, by TNC of any unauthorized destruction of occupied habitat, or dead or injured specimens of the covered species observed on Enrolled Properties and, if requested by the Service or the State, take such actions as requested to document the discovery.
5. Provide the Service and the State with an annual report, due on or before March 1 of each year this Agreement is in effect, that indicates if a Cooperative Agreement has been entered into and, if so, describes progress in implementing specified management activities, the results of annual surveys, the names of any qualified agents or contractors working on TNC's behalf in implementing the Agreement, and any compliance issues with regard to Cooperative Agreements.
6. Inform the Service and the State by e-mail or ground mail at the time of notification by the Cooperator or as soon thereafter as practicable, but no later than 10 business days, of the Cooperator's intent to transfer his/her Enrolled Property.
7. Communicate to a Cooperator any request by the Service or the State to visit an Enrolled Property for the purpose of evaluating the suitability of the property for butterfly translocations to or from it, or for the purpose of evaluating the effectiveness of the management activities carried out on such property, and to cooperate with the Service and the State in scheduling such visit.

8. Ensure that those involved with any aspects of implementation of the Agreement are appropriately trained and qualified. If anyone involved is not part of TNC, they must have appropriate permits from the State and Service (*e.g.*, ESA section 10(a)(1)(A) permit) as set forth in Section 10(I) (TNC Agents and Contractors) below.

B. In consideration of the foregoing, the Service agrees to:

1. Upon execution of the Agreement and satisfaction of all other applicable legal requirements, issue to TNC a permit in accordance with ESA section 10(a)(1)(A), and valid for a period of 30 years, authorizing take of the covered species as a result of implementing management activities specified in a Cooperative Agreement, or as a result of other lawful activities on Enrolled Properties after the management activities specified in such Cooperative Agreement have been initiated, provided that such taking shall not reduce the amount of occupied habitat present on the Enrolled Property below the amount identified in the baseline documentation as referenced in Part 4 above.
2. Provide to TNC and to Cooperators, technical assistance to the maximum extent practicable, when requested, and provide information on Federal funding programs.

C. In consideration of the foregoing, the State agrees to:

1. Upon execution of the Agreement and satisfaction of all other applicable legal requirements, issue to TNC a permit in accordance with Part 182 of Title 6 of the Compilation of New York Codes, Rules and Regulations, and valid for a period of 30 years, authorizing take of the covered species as a result of implementing management activities specified in a Cooperative Agreement, or as a result of other lawful activities on Enrolled Properties after the management activities specified in such Cooperative Agreement have been initiated, provided that such taking shall not reduce the amount of occupied habitat present on the Enrolled Property below the baseline amount as referenced in Part 4 above.
2. Provide to TNC and to Cooperators, technical assistance, to the maximum extent practicable, when requested, and provide information on State funding programs.

7. AGREEMENT AND PERMIT DURATION

The Agreement becomes effective upon issuance by the Service and the State of the permits described in Part 6 hereof, and will be in effect for 30 years. The Service and State permits will have a term of 30 years. Individual Cooperative Agreement terms may vary, but should not exceed the time remaining in the permit term as of the date the Cooperative Agreement is executed.

8. ASSURANCES

- A. Provided that such take is consistent with maintaining the baseline conditions identified in Part 4 hereof, the permits referenced in Part 6 shall authorize TNC and any Cooperator who

has entered into a Cooperative Agreement as provided herein, to take the covered species incidental to otherwise lawful activities in the following circumstances:

1. Implementing management activities identified in Part 5 hereof.
2. Making any lawful compatible use of the Enrolled Property after management activities identified in Part 5 have been initiated. Compatible uses include those uses that do not impair the quantity and quality of the butterfly habitat, including but not limited to, the use of existing trails on the property and walking throughout the entire property. No off-trail motorized vehicle use (unless associated with management) or any construction within butterfly habitat is considered compatible.

- B. The Parties shall be subject to the assurances provided for in 50 C.F.R. §§17.22(c)(5 & 6), 17.32(c)(5 & 6), and the ability of a landowner to return to baseline under specified conditions as identified in Part 7 of the Service's Safe Harbor Policy (64 Fed. Reg. 32717, 32724) which are hereby incorporated into this Agreement.

9. MODIFICATIONS

- A. Modification of the Agreement. Any party may propose amendments to this Agreement, as provided in 50 C.F.R. §13.23, by providing written notice to, and obtaining the written concurrence of, the other Parties. Such notice shall include a statement of the proposed modification, the reason for it, and its expected results. The Parties will use their best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon the other Parties' written concurrence.

10. OTHER MEASURES

- A. Remedies. Each party shall have all remedies otherwise available to enforce the terms of the Agreement and the permits.
- B. Dispute Resolution. The Parties agree to work together in good faith to resolve any disputes, and may elect to use dispute resolution procedures agreed upon by all Parties.
- C. Termination of a Cooperative Agreement; Adjustment of Baseline. As provided for in Part 12 of the Service's Safe Harbor Policy (64 Fed. Reg. 32717, 32725), the Cooperator may terminate the Cooperative Agreement and return the enrolled property to baseline conditions even if management activities identified in Part 5 have not been fully implemented, only if it can demonstrate circumstances beyond its control, and give TNC the notification required by the Cooperative Agreement prior to carrying out any activity likely to result in the taking of the covered species. Pursuant to Section 6.A.6, TNC shall notify the Service when it becomes aware of a Cooperator's intent to terminate a Cooperative Agreement. If the Cooperator terminates the Cooperative Agreement for any other reason, the permit referenced in Part 6.B.1 above shall immediately cease to be in effect as to that Cooperator's enrolled property.

As an alternative to termination, TNC and the Cooperator may adjust the Baseline Determination made pursuant to Section 4, if for reasons beyond the control of the Cooperator, the quantity and/or quality of occupied habitat is reduced from what it was at the time the Cooperative Agreement was negotiated. Any adjustment may only be made by mutual written agreement of the Parties and the Cooperator.

- D. Succession and Transfer of Cooperative Agreement. As provided in 50 C.F.R. §13.25(c), and Part 7 of the Service's Safe Harbor Policy (64 Fed. Reg. 32717, 32724), if a Cooperator who has entered into a Cooperative Agreement with TNC as provided herein transfers its interest in the Enrolled Property to another non-Federal person or entity, the Service and the State will regard the new owner as having the same rights and responsibilities with respect to the Enrolled Property as the original Cooperator, if the new owner agrees in writing to become a party to the original Cooperative Agreement.
- E. Termination, Succession or Transfer of Permit. TNC may only terminate its permit upon a showing of circumstances beyond its control. In such an instance, TNC will first work with the Service to identify a suitable successor that is capable of implementing the permit terms so that any enrolled Cooperator will not lose coverage provided by existing certificates of inclusion. In the event that a successor is not identified, the Service will use its best efforts to convert certificates of inclusion into individual Safe Harbor permits consistent with its issuance criteria and processes existing at the time, so long as the enrolled property owner so desires. Should a successor be necessary because of termination, or should TNC elect to assign its interest in the permit, transfer will be handled according to 13 C.F.R. §13.25 and Part 11 of the Service's Safe Harbor Policy (64 Fed. Reg. 32717, 32725).
- F. Permit Suspension or Revocation. The Service or the State may suspend or revoke the permits referred to in Parts 6.B.1 and 6.C.1, respectively, for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. The Service and State may also, after pursuing all appropriate options to avoid permit revocation, may revoke their respective permits if continuation of permitted activities would likely jeopardize the continued existence of the covered species (50 C.F.R. §13.28(a), 6 NYCRR Part 182).
- G. Availability of Funds. Nothing in this Agreement will be construed by the Parties to require the Service to expend in any one fiscal year any sum in excess of appropriations made by Congress, for the purposes of this Agreement for that fiscal year, or as involving the United States in any contract or other obligation for the further expenditure of money in excess of such appropriations.
- H. No Third-Party Beneficiaries. This Agreement does not create any new right or interest in any member of the public as a third-party beneficiary, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injuries or damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing law.
- I. TNC Agents and Contractors. With respect to the activities specified in Section 4 (completing Baseline Determination); Section 5 (providing technical advice to Cooperators and carrying out management activities included in Cooperative Agreements); and

Section 6.A.2 (monitoring implementation of management activities and carrying out annual surveys) of this Agreement, individuals, companies, or organizations serving as agents or contractors of TNC may assist TNC, provided that:

1. The entity or individual has secured any necessary and appropriate State and Service authorization under NYS-ECL §11-0535 and the ESA, respectively. For the purposes of this section, ESA authorization refers to an ESA Section 10(a)(1)(A) recovery permit or, if appropriate, delegated coverage under Condition E12 of the State's Permit TE838253-6 (issued by the Service to the State on May 15, 2007), or as amended. Condition E12 states that "Permit coverage is authorized to extend to other parties that the NYDEC cooperates with in the recovery of the KBB, provided the cooperative agreements are reviewed and approved by the FWS."; and
 2. Prior to allowing agents or contractors to undertake activities on its behalf, TNC shall inform the Service in writing of this intent, identifying the agent or contractor and providing a current address, contact information, names of all individuals to perform the work, and evidence of Service or State authorization required in 10.I.1. TNC shall also maintain and update a list of all agents and contractors to be submitted with its annual report, as required in Section 6.A.5.
- J. Public Laws. Nothing herein contained shall be deemed to be inconsistent with or contrary to the purpose or intent of any Act of Congress establishing, affecting, or relating to the Agreement.
- K. Direct Benefit Clause. No Member of, Delegate to, or Resident Commissioner in Congress shall be admitted to any share or part of this Agreement or to any benefit to arise therefrom, unless the share or part or benefit is for the general benefit of a corporation or company.
- L. Other Listed Species, Candidate Species, and Species of Concern. The possibility exists that other listed, proposed, or candidate species, or species of concern may occur in the future on the Enrolled Property as a direct result of management actions specified in Part 5 above. If that occurs and the Cooperator so requests, the Parties may agree to amend the Cooperative Agreement and associated permits to cover additional species and to establish appropriate baseline conditions for such other species.
- M. Notices and Reports. Any notices and reports, including monitoring and annual reports, required by this Agreement shall be delivered to the persons listed below, as appropriate:

The Nature Conservancy
Deputy Director – Eastern New York Chapter
195 New Karner Road, Suite 201
Albany, NY 12205

U.S. Fish and Wildlife Service
Field Supervisor
New York Field Office
3817 Luker Road
Cortland, NY 13045

New York State Department of Environmental Conservation
Director
Division of Fish, Wildlife, and Marine Resources
625 Broadway, 5th Floor
Albany, NY 12233-4754

N. References Cited.

U.S. Fish and Wildlife Service. 2003. Final Recovery Plan for the Karner Blue Butterfly (*Lycaeides melissa samuelis*). U.S. Fish and Wildlife Service, Fort Snelling, Minnesota. 273 pp.

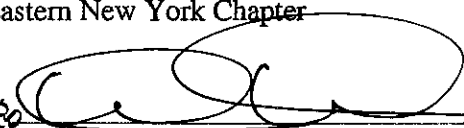
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APRIL 2010

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Agreement to be in effect as of the date that the Service and the State issue the permits referred to in Parts 6.B.1 and 6.C.1, above.



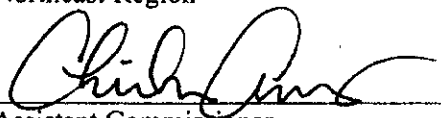
The Nature Conservancy
Acting Director
Eastern New York Chapter

4/22/10
Date



Regional Director
U.S. Fish and Wildlife Service
Northeast Region

5/6/10
Date



Assistant Commissioner
Natural Resources
New York State Dept. of Environmental Conservation

4-14-10
Date